U.S. Department of Justice

Environment and Natural Resources Division

90-11-2-354/15

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December 16, 2014

Via Federal Express & Electronic Mail

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David Platt
United Technologies Corporation
755 Main Street
Hartford, Connecticut 06103

Re: San Gabriel Valley Area 4, Puente Valley Operable Unit;
EPA Consent Decree with UTC/Carrier

Dear Mr. Krill and Mr. Platt:

This letter serves as a response by the U.S. Environmental Protection Agency ("EPA") to the issues raised, and the requests made, by the United Technologies Corporation ("UTC") and its subsidiary, Carrier Corporation, in the meeting with EPA on October 14, 2014 and in the follow-up letter dated November 4, 2014 from Mr. Krill. UTC/Carrier has requested that it be relieved of any further responsibilities, under the Consent Decree entered into with EPA in 2006, for the performance of remedial design and remedial action activities to address groundwater contamination in the Shallow Zone North of Puente Creek of the Puente Valley Operable Unit ("PVOU"). For the reasons outlined below, which we would like to discuss with UTC/Carrier in a further face-to-face meeting, EPA rejects UTC/Carrier's request.

UTC/Carrier's position in essence is that data collected by Northrop Grumman Corporation from 2002 and 2004 and which EPA did not receive from Northrop until December 2011, leads to the conclusion that UTC/Carrier has no further responsibilities for implementation of the interim remedy selected by EPA in the 1998 Record of Decision ("ROD") and Explanation of Significant Differences ("ESD") for the PVOU. EPA strongly disagrees with this conclusion. EPA also disagrees that the remedy is not implementable.

I. EPA's Response to UTC/Carrier's Factual and Technical Arguments

It is undisputed that UTC/Carrier and Northrop Grumman are the two largest sources of contamination in the PVOU. Northrop had significant releases of volatile organic compounds ("VOCs") – particularly trichloroethylene ("TCE"), 1,1- dichloroethene ("1,1 DCE"), and 1,4-dioxane – from its Benchmark Technology facility, formerly located at 200 South Turnbull Canyon Road, in the City of Industry, California. Northrop also had relatively small releases from two other source properties. The Carrier facility at 855 Anaheim-Puente Road, City of Industry, California, had, in addition to other earlier releases, a massive release of perchloroethylene ("PCE") in or about November 1984, as a result of a defective valve or leaks in a steel-lined floor sump. (The evidence suggests that smaller leaks originated from this facility as well, particularly given the levels of PCE found in the Intermediate Zone.) The release continued unabated for approximately six months, allowing approximately 8,000 to 20,000 gallons of PCE to migrate into the groundwater and proceed toward the mouth of the Valley.[1] Carrier did not take steps to control or address this release until late April 1985 when Carrier notified the Regional Water Quality Control Board that a PCE release had occurred. Although the Regional Board issued a facility-specific Order to Carrier in March 1986 (CAO 86-1, which was later revised in April 1988 as CAO 88-11) to remediate this contamination at, and in the immediate vicinity of, its facility, and Carrier performed work under that Order, the evidence nevertheless indicates that a significant volume of contamination from this and other onsite releases was never controlled and, in fact, proceeded toward and eventually reached the Intermediate Zone of the mouth of the Valley area of the PVOU. That contamination was not addressed by the Regional Board's Order but rather is being addressed by EPA's area-wide interim containment remedy. Thus, throughout EPA's long period of enforcement against and negotiations with UTC/Carrier, it has been EPA's consistent position, supported by groundwater investigations, that significant amounts of the PCE contamination in the Intermediate Zone released from Carrier's mid-Valley facility reached the mouth of the Valley. This occurred, notwithstanding the fact that UTC/Carrier has performed work under the Regional Board's Order to, in part, address the release at its facility. Carrier's work did not and does not capture all the contamination from the catastrophic release nor has it captured earlier releases from the property.[2]

Furthermore, EPA's allocation of responsibility among Potentially Responsible Parties ("PRPs") for the area-wide Puente Valley groundwater contamination looked at the Puente

[1] UTC/Carrier initially estimated that the amount of PCE released from the sump was 15,000 to 20,000 gallons, and later revised the estimate to 8,000 to 20,000 gallons. UTC/Carrier did not implement detailed inventory control procedures for PCE until after the discovery of this release.

[2] The purchasing records (from 1972-1983) of BDP Company (Carrier's predecessor) show very large purchases of PCE in the 1970s and 1980s and the quantities sometimes jumped dramatically from one year to the next. For example, in 1975 the company purchased 39,500 gallons and in 1976 72,700 gallons. In 1977 the company purchased 34,000 gallons and in 1978 73,000 gallons. The company stated that "[m]ost of the quantities purchased were lost to evaporation during manufacturing processes and thus were never disposed of." EPA does not find it credible to assert that none of these many thousands of gallons of PCE were ever released or disposed of prior to the catastrophic spill. Particularly given the lack of inventory control noted above. See Table I of BDP Company's response dated March 16, 1984 to EPA's information request dated January 12, 1984.

Valley Operable Unit as a whole, using the highest level of contamination at a representative well at each facility as a key benchmark, along with certain other criteria, regardless of the facility's location within the Valley. Thus the allocation did not give particular weight to whether a facility is located in the mid-Valley area or the mouth of the Valley area.

After UTC/Carrier declined to continue negotiations with the other PRPs to whom EPA had sent special notice, EPA issued a Unilateral Administrative Order to Carrier, directing it to perform the remedial design and remedial action for all of the Shallow Zone of contamination addressed by EPA's interim ROD. Carrier declined to comply with the UAO, setting forth its reasons and defenses in a statement of sufficient cause, dated September 26, 2001. After EPA began taking steps to enforce the Order, UTC/Carrier initiated negotiations with EPA to address its liability, culminating in the Consent Decree between EPA and UTC/Carrier, which was entered by the District Court in April 2006.

Prior to the Consent Decree negotiations with Carrier, EPA re-evaluated the allocation of responsibility between Carrier and Northrop, particularly in light of EPA's determination that virtually all of the 1,4-dioxane contamination stemmed from Northrop's Benchmark facility. Thus, in the Consent Decree, UTC/Carrier was assigned a significantly lesser share of responsibility than it had been assigned under the Order and the duration of the responsibility was limited to eight years from the date the remedy becomes operational and functional. All of the Shallow Zone responsibility South of Puente Creek was assigned to Northrop Grumman under the regulatory supervision of the Regional Board's revised Cleanup and Abatement Order. UTC/Carrier's responsibility was reduced to addressing the Shallow Zone North of Puente Creek for eight years from the operational and functional date. EPA's 2009 Consent Decree with Northrop contained an explicit reservation authorizing EPA to require Northrop to perform additional work in the Shallow Zone South of Puente Creek.

UTC/Carrier argues that the Northrop data collected in 2002/2004 at Benchmark, which indicated that contamination at the facility was deeper than previously believed, would have significantly altered the allocation of responsibility between Northrop and UTC/Carrier. EPA disagrees with this assertion. EPA acknowledges that the deeper zone of contamination will require more extensive work by Northrop. Even before becoming aware of the 2002/2004 data, EPA had determined that more work may be needed South of Puente Creek and that in order to ensure proper coordination and performance of all the remedial work, EPA should take the lead for oversight of Northrop's work in the Shallow Zone South of Puente Creek. The Regional Board agreed with this assessment and in March 2010 EPA formally took the lead on this work. In September 2011, pursuant to the reservation in the 2009 Consent Decree, EPA issued a UAO to Northrop to perform remedial design and remedial action in the Shallow Zone South of Puente Creek. Northrop has been performing extensive investigation work in the Shallow Zone South area, installing 89 wells over the last several years. Northrop will be designing and implementing a system to contain the Shallow Zone contamination South of Puente Creek. Furthermore, based on the investigation conducted to date, Northrop will also be performing further source control work at the Benchmark facility itself. Northrop is also performing all of the Intermediate Zone remedy.

Obtaining the data earlier would not have translated into allocating less responsibility to UTC/Carrier for addressing the area-wide groundwater plume. EPA's internal allocation of responsibility among all the PRPs was based on the highest level of contamination at a representative well at each PRP's facility, along with certain other criteria. It did not depend on the geographic location of the facility, the depth of the contamination, or the type of contamination**.** At large groundwater sites such as Puente Valley, a reasonable allocation can be performed in a number of different fashions. EPA believes strongly that the methodology it used was fair, equitable, reasonable, and defensible, even though a PRP performing an allocation might have chosen somewhat different criteria.

EPA believes that Carrier's enormous, catastrophic release at its mid-Valley facility in 1984-85 was undetected for a significant period of time and was not fully addressed, allowing portions of PCE to migrate toward and into the mouth of the Valley. It is undisputed based on current and historic groundwater monitoring that significant levels of PCE contamination exist in the mouth of the Valley. Inasmuch as Northrop, based on the existing data, primarily used TCE, 1,1,1 TCA, and 1,4-dioxane in its operations at Benchmark, the PCE contamination in the mouth of the Valley is unlikely to have come from the Benchmark facility. While EPA recognizes that other smaller sources of PCE exist in the PVOU, Carrier's releases of PCE are far and away the largest PCE releases. Thus, in addition to the reasons already stated, the deeper levels of TCE and 1,4 dioxane that the 2002/2004 data revealed at Benchmark do not in any way mean that the Carrier releases did not contribute to the PCE contamination found in the mouth of the Valley.

Mr. Krill's letter refers to certain EPA Criminal Investigation Division ("CID") interview summaries with two EPA staff members in connection with his argument that the deeper Benchmark data would have caused EPA to change its allocation and assign no Shallow Zone RD/RA work to UTC/Carrier. EPA could not disagree more with the contention that the interviews indicate that EPA would have performed a different allocation or not assigned any responsibility to UTC/Carrier for the Shallow Zone.

First, we note that these interview summaries are the notes recorded by the CID investigator in an investigation that was being conducted into certain actions by Northrop. The summaries were not prepared to evaluate UTC/Carrier's legal responsibility under CERCLA at the PVOU. The interview summaries are not complete records of the conversations that were held, and were not shared with or reviewed by the witnesses for accuracy or completeness.

Second, the interview summaries do *not* state or suggest that EPA would have made different allocation decisions in the PVOU or that it would have determined that UTC/Carrier did not need to perform any Shallow Zone work or that UTC/Carrier had no further work responsibilities for implementing the interim remedy. EPA, in fact, has continued to use this allocation to reach settlements with certain remaining PRPs, including settlements reached as recently as the last two years.

II. EPA's Response to UTC/Carrier's Legal Arguments

EPA disagrees that there is a legal basis for modifying or setting aside the 2006 Consent Decree. First EPA, disagrees that the Supreme Court's decision in *Burlington Northern & S.F. Ry. Co. v. United States*, 129 S.Ct. 1870 (2009) constituted a significant change in the law regarding divisibility or apportionment. On the contrary, in *Burlington Northern* the court noted that (a) the Restatement (Second) of Torts, (b) a very early District Court case under CERCLA, *United States v. Chem-Dyne Corp*, 572 F. Supp. 802 (S.D. Ohio 1983), and (c) various Courts of Appeal, have all made clear for many years that apportionment may be appropriate when there is a reasonable basis for determining the contribution of each cause to a single harm.

In this regard, in *United States v. Iron Mountain Mines*, 2010 WL 1854118 (E.D.Cal. May 6, 2010), we note that the District Court for the Eastern District of California explicitly rejected a PRP's argument that *Burlington Northern* was a significant change in the law that should cause the court to reconsider a 2002 order that applied joint and several liability. The court held that *Burlington Northern* "simply reiterated the law as established" in earlier cases "and then examined the record to resolve a factual question of whether the record supported apportionment."

Second, EPA does not believe that any of the cases cited in Mr. Krill's letter support modifying or setting aside the 2006 Consent Decree. While we agree that a court has authority to modify consent decrees under limited circumstances, those circumstances are not the ones presented in your letter. In *Rufo v. Inmates of Suffolk County Jail*, the Supreme Court articulated the applicable two prong standard for modifying a consent decree under Rule 60(b)(5). 502 U.S. 367, 384 (1992). The moving party must satisfy the initial burden of showing a significant change in either the factual conditions or in the law warranting modification of the decree. *Id.* at 384. The district court must then determine whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions. *Id*. at 391. In particular, "[i]f the movant cites significantly changed factual conditions it must additionally show that the changed conditions make compliance with the consent decree "more onerous" "unworkable" or "detrimental to the public interest." *United States v. Asarco Inc., et al*., 430 F.3d 972, 979 (9th Cir. 2005). Courts have looked to traditional contract law to determine what the parties anticipated when entering into a consent decree. *Id*. at 980 (court refused to modify consent decree where express consent decree language was clear.)

By contrast, in this case, the 2006 Consent Decree expressly calls for flexibility in future work requirements and future costs. See Paragraphs 13 and Section XXXII of the Consent Decree, as well as the definition of Future Costs at page 6 of the Consent Decree. Thus, the plain language of the Consent Decree makes clear that the parties actually knew at the time they entered into the Consent Decree that costs might increase as time and investigations moved forward, and that modifications to the work could be required. Compare this with the unusual circumstances in *United States v. El Dorado County, et al*., 2:2001 cv 01520 (C.D. Cal. 2011). In *El Dorado*, during the negotiation process and prior to lodging of the Consent Decree, the U.S. Forest Service provided detailed specifications for work to be done under the Consent Decree. The defendant county was found to have relied reasonably on these specifications for the purpose of obtaining bids and entering into the Consent Decree itself. Unlike in *El Dorado*,

the plain language of Carrier's consent decree makes evident that Carrier agreed to the broad outlines of the remedy for the Shallow Zone North of Puente Creek and agreed to perform the design itself, knowing that as investigation ensued and years passed, the specifics and costs might change.

In addition, in deciding whether to modify or set aside a consent decree, courts consider whether the original purpose of the consent decree is being met. *Asarco*, 430 F.3d at 983 ("[to modify the consent decree] would also strip the decree of its broader purpose, "which is to enable parties to avoid the expense and risk of litigation while still obtaining the greater enforceability (compared to an ordinary settlement agreement) that a court judgment provides."). Here, were the court to "relieve" Carrier of its obligations under this Consent Decree it would undermine the goals of the original Consent Decree, to "facilitate the cleanup of the Site and avoid prolonged and complicated litigation between the Parties," (Consent Decree at Par. L), and to honor the enforceability of CERCLA consent decrees nationally. Compare *United States v. SB Building Associates, Limited Partnership, et al.*, 3:08-cv-05298 (D.NJ) (2014) – cited in Mr. Krill's letter – where the underlying obligation of $40,000 generated stipulated penalties of close to $800,000. In *SB Building Associates*, the court did modify the Consent Decree but in doing so ensured that the defendants paid the full amount of their underlying obligations under the consent decree. The court only reduced the stipulated penalties in view of the pending bankruptcy and known financial challenges of the defendants. Unlike in *SB Building*, where the underlying obligations were met, in this case, Carrier asks to be relieved of the obligations themselves. The modification your client is requesting would leave the Shallow Zone North without a performing party – a result that undermines the purpose of the Consent Decree and is clearly not in the public interest.

III. Conclusion

For all of the reasons set forth above, EPA disagrees that there is a factual or legal basis for modifying or setting aside the 2006 Consent Decree. UTC/Carrier is essentially seeking to have the Consent Decree vacated or voided. Furthermore, we note that even if UTC/Carrier were successful in vacating or voiding the Consent Decree, UTC/Carrier would then be back in the position it was in prior to 2006, without a covenant or contribution protection. EPA could then issue a further Order to Carrier under Section 106 of CERCLA and/or proceed with its Complaint, asking the Court to determine that Carrier is jointly and severally liable for past and future response costs at the PVOU.

We also disagree with UTC/Carrier's contention that the interim remedy cannot be implemented. With respect to the remedy for the Intermediate Zone, Northrop Grumman, after considerable effort, is now poised to complete its Remedial Design. Northrop is close to purchasing a property for its treatment plant and has entered into an agreement in principle, reflected in a term sheet, with local water purveyors to receive and serve the treated water as drinking water. Northrop has also done extensive investigation work in the Shallow Zone South of Puente Creek, pursuant to the UAO and will be continuing work under EPA's direction to ensure that a remedy is implemented.

UTC/Carrier still has considerable work to do on the Remedial Design for the Shallow Zone North of Puente Creek. We have spent the last couple of years working with UTC/Carrier on reinjection as an alternative end use and UTC/Carrier has purchased a property at a location that would be suitable for a reinjection end use.

EPA disagrees with the contention in Mr. Krill's letter that "there is no practical way for anyone to determine whether vertical containment will be achieved." The issue of vertical containment was discussed at great length with UTC/Carrier prior to signing the 2006 Consent Decree. In fact, the Consent Decree and Statement of Work ("SOW") contain flexibility with respect to how vertical containment will be achieved and measured. In addition, the Performance Criteria established allow for a period of time to bring the remedial system back into compliance. For example, EPA may extend monitoring intervals and use a multiple lines of evidence approach in addition to the trend-based response actions outlined in the SOW. The Performance Criteria are clear that if Shallow Zone contamination less than 10-times MCLs migrates into the Intermediate Zone it will not constitute an exceedance of the Shallow Zone Performance Criteria. If EPA determines that attainment of Performance Criteria is not practical within the time frames outlined in the Carrier SOW, then EPA will establish a reasonable time frame in which Performance Criteria are to be reached.

EPA would like the opportunity to meet with UTC/Carrier in San Francisco (with some participation via VTC, as needed) to discuss these issues further. We would suggest meeting in the first half of January.

Sincerely,

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